Supreme Court, U.S.
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No. 98-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ADELA NAJAR VDA. PANTA, individually and as personal representative of the Estate of AUGUSTIN PANTA PAZOS; EDGAR PANTA NAJAR; ROSA DEL CARMEN NAJAR; ELVIS ANDERSON PANTA NAJAR,

Petitioners,

vs.

AFRAM CARRIERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

LITIGANTS

1. Adela Nájar Vda. de Panta

2. Edgar Panta Najar

3. Rosa del Carmen Panta Najar

4. Elvis Anderson Panta Najar

5. Afram Carriers, Inc.

6. Kirby Corporation

7. Kirby Marine Transportation Corp.

8. Bruce Moeykens[1]

9. Cynthia Moeykens

10. Sacramento Garza

11. Francisco De La Fuente

12. Thomas Blair Corrales

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1. The persons identified in numbers 8 through 17 are, in addition to the Petitioners, each personal injury claimants to the underlying fund.

13. Cruz de Jesus Hernandez

14. Abelardo Leiva

15. Robert B. Neal

16. Jane Lunning

17. Edward Shimel

18. Anchor Fumigation & Pest Control, Inc.[2]

19. Van Waters & Rogers, Inc.

20. AmeriBrom, Inc.

21. Great Lakes Chemical Corporation

22. Bromide Compounds, Ltd.

23. Dead Sea Bromide Group

INSURERS

24. The Steamship Mutual Underwriting Association (Bermuda) Ltd.

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2. The entities identified in numbers 18 through 23 are additional defendants in the underlying proceeding.

TABLE OF CONTENTS

	Page
Rule 29.6 Statement	i
Table of Contents	iii
Table of Cited Authorities	vi
Statement of the Case	1
A. The Facts	1
B. Petitioners' Misstatements	4
Reasons for Denying the Writ	5
I. The Petition Should Be Denied Because The United States Court Of Appeals For The Fifth Circuit Applied The Proper Analysis In Reviewing A Forum Selection And Choice Of Law Clause In An International Contract.	5
A. Forum Selection Clauses Are Presumptively Valid	6
B. A Reasonable Forum Selection Clause Is a Fair Clause	7
C. There Is No Conflict in the Fifth Circuit	9
D. *Moseley v. Electronic & Missile Facilities* Is Not Problematic	10

Contents

Page

E. Forum Selection Clauses in Post-Incident Releases Are Not Entitled to Greater Scrutiny 12

F. The Settlement Was Adequate Under the Circumstances 13

II. The Petition Should Be Denied Because There Is No Need For Guidance From This Court Since The Rule Regarding Enforcement Of Forum Selection Clauses Is Clear. 14

A. Petitioners Attempt to Create a False Conflict 14

B. The *Quarrington* Decision Is an Outdated Statement of the Law 15

C. There Is No Conflict Between the Fifth And Tenth Circuits 16

III. The Petition Should Be Denied Because The Doctrine Of Judicial Estoppel Does Not Apply In The Present Case; Therefore, This Court Need Not Consider The Formulation Of A Uniform Rule To Determine When A Party May Raise The Argument. 17

IV. The Petition Should Be Denied Because The Court Of Appeals Addressed All Of The Issues Properly Before It. 18

Contents

		Page
A.	Petitioners Have Failed to Raise a Valid Point of Review as This Is Not an Error Correcting Court	18
B.	The Lower Court Properly Disposed of the Judicial Estoppel Argument	19
C.	Unilateral Mistake Was Considered by the Court of Appeals	19
D.	The Economic Duress Argument Went to the Settlement Agreement as a Whole, and Not to the Forum Selection Clause	19
Conclusion		20

TABLE OF CITED AUTHORITIES

Page

Cases:

Bhatia v. Johnston, 818 F.2d 418 (5th Cir. 1987) 12

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) ...6, 8, 9, 10, 16, 19

Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994) .. 17

Hartford Accident & Indem. Co. v. Southern Pacific Co., 273 U.S. 207, 47 S. Ct. 357, 71 L.Ed. 612 (1927) 16

Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997) 5, 6, 8, 11, 12, 19

Jones v. Weibrecht, 901 F.2d 17 (10th Cir. 1990) 16

Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216 (5th Cir.), *cert. denied*, __ U.S. __, 1998 WL 772808 (1998) 8, 9

Maryland Cas. Co. v. Cushing, 347 U.S. 409, 74 S. Ct. 608, 98 L.Ed. 806 (1953) 16

Matterhorn, Inc. v. NCR Corp., 727 F.2d 629 (7th Cir. 1984) 12

Mitsui & Co. (USA), Inc. v. MIRA M/V, 111 F.3d 33 (5th Cir. 1997) 6, 7, 12, 19

Cited Authorities

	Page
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)	7
Moseley v. Electronic & Missiles Facilities, Inc., 374 U.S. 167, 83 S. Ct. 1815, 10 L. Ed. 2d 818 (1963)	5, 6, 10, 11
M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1973)	6, 8, 9, 14, 15, 16, 17, 19
Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)	12
Schacht v. Beacon Ins. Co., 742 F.2d 386 (7th Cir. 1984)	12
Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)	12
Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)	14
The Quarrington Court, 102 F.2d 916 (2d Cir.), *cert. denied*, 307 U.S. 645 (1939)	15
United States v. C.I.T. Constr. Inc. of Texas, 944 F.2d 253 (5th Cir. 1991)	17
Vimar Seguros y Reaserguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995)	12, 16

Cited Authorities

Page

Statutes:

9 U.S.C. § 1, *et seq.* 10

28 U.S.C. § 1404(a) 14

40 U.S.C. § 270, *et seq.* 10

46 U.S.C. § 181, *et seq.* 1

Rule:

Federal Rules of Civil Procedure F(4) 1

Other Authority:

3 BENEDICT ON ADMIRALTY § 52 (1997) 15

STATEMENT OF THE CASE

A. The Facts

This case concerns the validity of a forum selection and choice of law provision, calling for the application of Peruvian law in a Peruvian court, in a settlement agreement negotiated and executed in Peru, between an American entity, the Respondent, Afram Carriers, Inc. (hereinafter "Afram"), and Peruvian nationals, Adela Najar Vda. Panta, Edgar Panta Najar, Rosa del Carmen Panta Najar and Elvis Anderson Panta Najar (hereinafter collectively referred to as "Petitioners"), for an incident that occurred in Peru.

The underlying case is an action for limitation or exoneration from liability pursuant to 46 U.S.C. § 181, *et seq.* Afram filed this litigation because of personal injuries and property damage which allegedly occurred as a result of fumigation of the SS TAMPA BAY while at anchor in the Port of Callao, Peru.[1] Afram provided a notice to all personal injury and property damage claimants who had potential claims in the proceedings[2]; however, Afram did not give notice to Petitioners because the claims asserted by these survivors of Augustin Panta Pazos, an individual Peruvian national on board the vessel, were settled. Specifically, Afram and Petitioners executed the settlement agreement, notarized by a Peruvian notary public, which provided that any dispute with regard to the settlement would be resolved in the courts of Peru applying Peruvian law. Specifically, Paragraph 9 of the settlement agreement provided as follows:

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1. As is noted in the Parties to the Proceedings, there are nine (9) seamen, who were allegedly exposed to methyl bromide while on board the SS TAMPA BAY at anchor at the Port of Callao, Peru in November, 1995. The United States asserted a cargo claim in connection with damage to the cargo on board the vessel, and Afram also asserted a claim against CARE, the charterer of the SS TAMPA BAY, for detention and breach of charter. However, the claims concerning cargo, detention, and breach of charter party have been resolved and have been dismissed. The personal injury claims are still pending, and the documentation and expert evidence submitted by the nine (9) personal injury claimants, other than Petitioners, indicate that these claims will significantly exceed the limitation fund.

2. Notice was properly given in accordance with Supplemental Rule F(4) of the Federal Rules of Civil Procedure after receipt of an order dated November 21, 1995, which restrained prosecution of claims.

> This Agreement shall be interpreted, governed by, and construed in accordance with the laws of the Republic of Peru and any issue arising out of this Agreement will be subject to the exclusive jurisdiction of the Peruvian courts applying Peruvian law.[3]

A certificate of release demonstrates that the settlement funds were paid to Petitioners.

On April 4, 1997, approximately one and a half years (1-1/2) after Petitioners executed the settlement agreement, Petitioners filed a Motion for Leave to Intervene with the United States District Court for the Southern District of Texas, Houston Division, in an attempt to set aside the settlement agreement. Thereafter, on or about June 18, 1997, Petitioners filed a First Amended Complaint in Intervention. Afram opposed Petitioners' intervention because the parties had agreed that any dispute with regard to the settlement agreement would be resolved by Peruvian courts applying Peruvian law.

The district court entered an order dated June 30, 1997, confirming the validity and enforceability of the forum selection provision of the settlement agreement, but the district court requested "additional briefing to address the court's concerns," *i.e.*,

> supposing the settlement agreement were enforceable, the court is concerned about the possible effects that enforcing the forum selection provision would have on the Panta claimants with respect to this litigation.

In response, Petitioners filed their court ordered brief on July 15, 1997, which made numerous arguments regarding the alleged invalidity of the settlement agreement. However, Petitioners did not address the district court's concern about the litigation.

On July 29, 1997, Afram filed its response to Petitioners' court ordered brief which confirmed that Afram's attorney in this litigation

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3. The original Spanish is as follows:

> NOVENO: Este Acuerdo debera entenderse, reirse e interpretarse de conformidad con la legislacion de la Republica del Peru. Cualquier asunto que surja del mismo estara sujecto a la jurisdiccion exclusiva de las leyes peruanas.

had contacted a Peruvian attorney to determine that Petitioners had a right to pursue a cause of action to set aside the settlement agreement in Peru on the basis of alleged fraud and misrepresentation. Afram also provided the facts about the settlement negotiations in Peru, *i.e.*, Petitioners contacted the Captain of the Port in Peru and requested the Captain of the Port to direct them to an Afram representative because Petitioners were interested in making a claim against the vessel owner and receiving some prompt compensation. Afram offered to provide an affidavit from the Peruvian lawyer concerning Petitioners' right to pursue litigation to set aside the settlement agreement on the basis of alleged fraud and misrepresentation, and an affidavit concerning the terms of the settlement agreement, if requested by the district court. However, Afram stated that

> these facts can be developed in the form of affidavits, but there is no need to obtain such affidavits because this evidence goes to the merits of the dispute to be decided in a Peruvian court on the basis of Peruvian law unless the court is interested in Affidavits from Peruvian lawyers concerning whether Petitioners have a right to request the court to set aside the out of court settlement.

At no point have Petitioners denied that they had a right to institute litigation in Peru to challenge the validity of the settlement agreement.

By an order dated September 26, 1997, the district court denied Petitioners' Motion for Leave to Intervene "contingent on Afram Carriers, Inc. submitting to jurisdiction in Peru to litigate the validity of the settlement agreement." This order further instructed Petitioners to institute an action in the appropriate Peruvian court within thirty (30) days from September 26, 1997. Subsequently, Afram filed its stipulation to submit to the jurisdiction of an appropriate court in Lima, Peru, and to litigate the validity of the settlement agreement between Petitioners and Afram. Afram was not served with process, and its attorney did not receive a courtesy copy of pleadings as requested in the stipulation. Therefore, it would appear that Petitioners have not initiated any proceedings in the Peruvian courts as ordered by the district court.

On October 21, 1997, Petitioners filed their Notice of Appeal. Subsequently, on or about January 12, 1998, Petitioners filed their

Motion to Substitute Parties and for Expedited Appeal, which the United States Court of Appeals for the Fifth Circuit granted on January 22, 1998. The Circuit Court heard oral argument on this expedited appeal the week of May 4, 1998, and published its opinion on June 26, 1998. That opinion is reported at 145 F.3d 298. Petitioners filed a petition for rehearing and a suggestion for rehearing *en banc*; both were denied. Thereafter, Petitioners filed a petition for writ of certiorari with this Court.

B. Petitioners' Misstatements

The Petitioners make the following misstatements in their Statement of Facts:

1. Petitioners make the bold assertion that Afram caused Mr. Augustin Panta's death. (*See* Petition at p. 2). However, the statement is wholly unfounded as there has been no fact finding.

2. Petitioners also assert that Afram "illegally purchased the methyl bromide." (*See* Petition at p. 2). That statement is also unsupported by any evidence as there has been no fact finding.

3. Petitioners make the unsubstantiated claim that Afram, through David Walker, exerted pressure on the Petitioners to execute the release. That claim is also unsupported by any evidence in the record or fact findings. (*See* Petition at p. 2).

4. Additionally, Petitioners state that during the pendency of the appeal before the United States Court of Appeals for the Fifth Circuit they unsuccessfully sought contingent fee representation in Peru. (*See* Petition at p. 4). However, there is no record of that before the intermediate appellate court or this Court.

5. Throughout the Petition, Augustin Panta is referred to as a seaman. He was not. Rather, he was a security guard.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Writ of Certiorari for at least four (4) reasons: (1) the United States Court of Appeals for the Fifth Circuit applied the proper analysis in reviewing a forum selection and choice of law clause in an international contract; (2) there is no need for guidance since the rule regarding enforcement of forum selection clauses is clear; (3) the doctrine of judicial estoppel is not applicable in the present case; and (4) the Court of Appeals considered all of the arguments put before it. This case raises no novel issue for the Court's consideration. Likewise, there is no conflict among the Circuits regarding the proper test to apply in determining the enforceability of a forum selection clause in international contracts. Each is discussed in detail below.

I.

THE PETITION SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT APPLIED THE PROPER ANALYSIS IN REVIEWING A FORUM SELECTION AND CHOICE OF LAW CLAUSE IN AN INTERNATIONAL CONTRACT.

(Addressing Point I, pp. 5-12).

This Court should deny the Petition currently before it because the United States Court of Appeals for the Fifth Circuit applied the proper analysis in reviewing a forum selection and choice of law clause in an international contract for at least six (6) reasons: (1) the general rule is that forum selection clauses are presumptively valid; (2) if a forum selection clause is reasonable, it is also fundamentally fair; (3) despite Petitioners' best efforts to create a conflict within the Fifth Circuit, none exists; (4) there is no authority, nor is there any valid public policy reason, to require a more stringent test regarding the enforceability of forum selection clauses in settlement agreements as opposed to prospective releases; (5) the Fifth Circuit's analysis in this case and in *Haynsworth v. The Corporation*[4] in the context of forum selection clauses is the correct analysis, and *Moseley v. Electronic & Missiles*

4. 121 F.3d 956 (5th Cir. 1997) (forum selection clause enforceable as appellant could not demonstrate that the clause was inserted into the agreement by fraud or overreaching).

Facilities, Inc.[5] does not conflict in any meaningful manner; and, (6) the settlement in the present case was not inadequate for Mr. Augustin Panta, a non-seaman, because by Peruvian standards, as noted by the Court of Appeals, his survivors received approximately one year's salary. Each of these will be discussed in turn below.

A. Forum Selection Clauses Are Presumptively Valid (Addressing pp. 5-12 of the Petition).

For over a quarter century, this Court has consistently held that forum selection clauses are presumptively valid.[6] This presumption may be overcome, however, by showing that a forum selection provision is unreasonable. As noted by this Court, the burden of proving unreasonableness is heavy and requires a showing that the clause results from fraud or overreaching; that it violates a strong public policy; or that enforcement of the clause deprives the plaintiff of his day in court.[7] Allegations that the entire contract was procured by fraud or overreaching are inappropriate to a court's forum selection clause enforceability determination.[8]

Petitioners failed to overcome the presumption of the validity of the forum selection clause because: (1) they could not show that Afram procured the forum selection clause by fraud or overreaching; (2) the clause did not violate the public policy of the United States; and,

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5. 374 U.S. 167, 83 S. Ct. 1815, 10 L. Ed. 2d 818 (1963).

6. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 1528, 113 L. Ed. 2d 622, 633 (1991) (forum selection clause in a passenger cruise ticket held to be enforceable in a bodily injury case even though the passenger did not negotiate provision as it was contained in a form contract); *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1914-15, 32 L. Ed. 2d 513, 521-22 (1973) (forum selection clause in towing contract between American company and Italian company calling for court in London to hear case was held to be valid).

7. *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997) (citing *M/S BREMEN*, 407 U.S. at 12-13, 92 S. Ct. at 1914-17, 32 L. Ed. 2d at 521-22).

8. *Haynsworth*, 121 F.3d at 964.

(3) enforcement of the clause would not prevent Petitioners from having their day in court.

First, in the absence of evidence, Petitioners attempt to string together a chain of inferences in an effort to paint a picture of fraud. The Circuit Court explained that Petitioners' argument was foreclosed by binding precedent in the Circuit and by the policies underlying the presumption in favor of enforcing such clauses because this Court has instructed the lower courts to enforce forum selection clauses in the interests of international comity and out of a deference for the integrity and proficiency of foreign courts.[9]

Second, the clause did not violate the public policy of the United States. As explained by the Circuit Court below, there are competing policy concerns within the Limitation of Liability Act. On the one hand is the subsidization of the shipping industry, while on the other is the "goal of equitable resolution", which permits all claimants equal access to the limitation fund.[10] In its opinion, the Circuit Court decided that the more fundamental policy underlying the Limitation of Liability Act focuses on providing subsidization to the shipping industry resulting in favoring the presumption of the forum selection clause's enforceability.

Third, Petitioners presented no evidence at the district court that they would not be able to proceed in a Peruvian court. In fact, Afram submitted to the jurisdiction of the appropriate court in Peru, and the Petitioners have never denied their right to institute litigation in Peru to challenge the validity of the settlement agreement entered into by Petitioners.

B. A Reasonable Forum Selection Clause Is a Fair Clause (Addressing pp. 6-10 of the Petition).

Petitioners argue that the Fifth Circuit failed to conduct a fundamental fairness review in the instant case and extended its prior

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9. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 457 (1985); *MIRA M/V*, 111 F.3d at 35.

10. *Afram*, 145 F.3d at 298.

decision in *Haynsworth v. The Corporation*.[11] That argument ignores that "reasonableness", as defined by the Courts, constitutes "fundamental fairness". As discussed above, the presumption of enforceability may be overcome by a clear showing that a forum selection clause is unreasonable under the circumstances. Courts have held that unreasonableness potentially exists where:

1. the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching;

2. the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum;

3. the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or

4. enforcement of the forum selection clause would contravene a strong public policy of the forum state.[12]

In the present case, the forum selection clause was fair and reasonable. Petitioners, Peruvian citizens, are able to challenge the settlement agreement in a Peruvian court applying Peruvian law for an incident that occurred in Peru. A reasonableness issue would have existed under the facts of the present case if the agreement provided for the application of American law in an American court; Petitioners would have a better argument that the forum selection was not reasonable under the circumstances. However, that is simply not the case since the Petitioners are in their home forum subject to the application of their domestic law.

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11. 121 F.3d 956 (5th Cir. 1997).

12. *Carnival Cruise Lines*, 499 U.S. at 595, 111 S. Ct. at 1528, 113 L. Ed. 2d at 633; *M/S BREMEN*, 407 U.S. at 12-13, 92 S. Ct. at 1914-15, 32 L. Ed. 2d at 521-22; *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir.), *cert. denied*, __ U.S. __, 1998 WL 772808 (1998) (holding forum selection clauses are enforceable as long as they are reasonable).

As is noted in the section above, the Fifth Circuit considered whether Petitioners had overcome the presumption of enforceability, and the Court concluded they had not.

C. There Is No Conflict in the Fifth Circuit
(Addressing pp. 8-9 of the Petition)

Petitioners also argue that the contemporaneously decided case of *Marinechance Shipping Ltd. v. Sebastian*,[13] which this Court denied the Petition for Writ of Certiorari on December 14, 1998, conflicts with the case currently before the Court; however, that assertion does not endure scrutiny.

In *Marinechance Shipping*, the Fifth Circuit considered an employment contract, entered into by Filipino seamen and a Cypriot corporation, and approved by the Philippine Overseas Employment Administration which contained a forum selection clause calling for the application of Philippine law in the Philippine courts for disputes arising under the contract.

Two (2) Filipino seamen were injured in American waters. Thereafter, the vessel's owner, Marinechance Shipping, filed a lawsuit seeking a declaration that any litigation arising out of the incident must proceed in the Philippine courts under Philippine law. The vessel owner also sought to limit its liability. The district court then enjoined the seamen from filing suit in a Louisiana state court, and granted a partial summary judgment enforcing the forum selection clause in the employment contract.

In its review, the Court of Appeals enunciated the rule in *M/S BREMEN*, and noted that it was the seamen's burden to show that the forum selection clause was unreasonable.[14] Then turning to this Court's analysis in *Shute*, the Circuit Court stated that the forum selection clause was enforceable if it was reasonable, thereby essentially equating "reasonableness" with "fundamental fairness".[15] The Court of Appeals

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13. 143 F.3d 216 (5th Cir.), *cert. denied*, __ U.S. __, 1998 WL 772808 (1998).

14. 143 F.3d at 220.

15. 143 F.3d at 221.

held that the clause in a contract of adhesion was enforceable because it informed the seamen where suit would be brought for their causes of action and it reduced the vessel owner's exposure to suits around the world.

The analysis in the present case is not in the least distinguishable. Both panels of the Fifth Circuit applied the same test to evaluate the enforceability of the forum selection clauses at issue.

D. *Moseley v. Electronic & Missile Facilities* Is Not Problematic (Addressing p. 7 of the Petition).

Petitioners argue that the Court of Appeals decision in the present case ignored this Court's analysis in *Moseley v. Electronic & Missiles Facilities, Inc.*[16] which considered an arbitration provision in a construction contract for government facilities. As is discussed below, Petitioners' argument fails, however, for at least two (2) reasons: (1) the decision in *Moseley* has been modified by this Court's subsequent decisions; and (2) to the extent applicable, the Court of Appeals' analysis in this case is consistent with this Court's decision in *Moseley*.

Although this Court's decision in *Carnival Cruise Lines, Inc. v. Shute*[17] essentially overruled the reasoning which is relied upon by Petitioners, an examination reveals that the *Moseley*[18] case does not provide any authority to distinguish the Court of Appeals' decision in the present case. In *Moseley*, the primary issue was whether a claim under the Miller Act[19] based upon arbitration clauses in two (2) subcontracts, was enforceable under the Arbitration Act.[20] The petitioner in that case attacked the subcontracts, as well as the arbitration

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16. 374 U.S. 167, 83 S. Ct. 1815, 10 L. Ed. 2d 818 (1963).

17. 499 U.S. at 595, 111 S. Ct. at 1528, 113 L. Ed. 2d at 633.

18. The *Moseley* case, like the *Shute* case, considered a domestic contract containing a forum selection clause for a jurisdiction within the United States.

19. 40 U.S.C. § 270, *et seq.*

20. 9 U.S.C. § 1, *et seq.*

agreement, as being fraudulent. In its analysis, this Court stated that "[i]n considering the question of the sufficiency of the pleadings with reference to the allegation of fraud, we believe that, as alleged here, the issue goes to the arbitration clause itself, since it was to be used to effect the fraudulent scheme."[21] Essentially, the Court held that if the arbitration provision was procured by fraud, then there could be no arbitration. The case was remanded to the district court for consideration of the evidence.

In *Moseley*, this Court focused its review on the arbitration clause itself. Similarly, the Court of Appeals in the instant case focused on the forum selection clause, but the Petitioners presented no evidence regarding fraud connected with the forum selection clause. Specifically, the Court of Appeals in the present case noted as follows:

> Only when we can discern that the clause itself was obtained in contravention of the law will the federal courts disregard it and proceed to judge the merits. Because in this case, we can draw an inference of an illegally obtained forum-selection clause only if we judge the merits of the contract — that is, the movants have offered no evidence that the clause itself was obtained as a result of fraud or overreaching — we cannot disregard it on that ground.[22]

This is also consistent with the United States Court of Appeals for the Fifth Circuit's analysis in *Haynsworth v. The Corporation*[23] wherein the Court of Appeals noted that allegations of fraud or overreaching directed to the contract as a whole, or portions of it other than the forum selection provision, are insufficient. Instead, the claims of fraud or overreaching must be aimed straight at the forum selection provision in order to succeed, and the party seeking to invalidate the provision must introduce evidence to prove the allegations of fraud and overreaching clearly.[24] As this Court has stated previously, the exception for invalidating a forum selection provision:

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21. *Moseley*, 374 U.S. at 171, 83 S. Ct. at 1817, 10 L. Ed. 2d at 821.

22. *Afram*, 145 F.3d at 302.

23. 121 F.3d at 961.

24. *Haynsworth*, 121 F.3d at 963.

> . . . does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that . . . a forum selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or overreaching.[25]

Briefly, if the forum selection clause is valid, the parties are free to attack the underlying agreement in the forum agreed upon.

E. Forum Selection Clauses in Post-Incident Releases Are Not Entitled to Greater Scrutiny

(Addressing p. 9 of the Petition).

Petitioners argue that the Court of Appeals failed to consider the distinction between a forum selection clause in a contract which calls

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25. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-20 n. 9, 94 S. Ct. 2449, 2456-58 n. 9, 41 L. Ed. 2d 270, 281 n. 9 (1974). The same analysis has been applied by the courts in connection with forum selection and arbitration provisions when a party has argued fraudulent inducement. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). This Court extended the rule in *Prima Paint* to forum selection and choice-of-law provisions in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). In fact, *Scherk* and later courts have concluded that foreign arbitration clauses are but a subset of foreign forum selection clauses. *M/V SKY REEFER*, 515 U.S. at 539, 115 S. Ct. at 2329, 132 L. Ed. 2d at 474 (1995); *Haynsworth*, 121 F.3d at 963; *Mitsui*, 111 F.3d at 36. Likewise, in *Bhatia v. Johnston*, 818 F.2d 418, 422 (5th Cir. 1987), the plaintiff attempted to avoid an arbitration clause in a brokerage agreement by claiming he had been told that the clause was the same as that in the previous contract, but the United States Court of Appeals for the Fifth Circuit held that any misrepresentations related to the entirety of the new agreement and were insufficient to block enforcement of the clause. *See also Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 389 (7th Cir. 1984) ("Appellant nowhere contends that the alleged fraud in the inducement applied *solely* to the arbitration clause. Its claim of fraud applies equally to all provisions of the contract. Thus, if the clause is sufficiently broad to encompass a claim of fraud in the inducement, the district court properly concluded that *Prima Paint* precludes the court from addressing that claim."); *Matterhorn, Inc. v. NCR Corp.*, 727 F.2d 629, 630 n. 3 (7th Cir. 1984) ("Where the claim of invalidity goes to the entire contract containing the agreement to arbitrate, . . . [t]he issue is for an arbitrator to decide."). There is no conflict among the Circuit Courts.

for litigation of an unknown incident and a settlement agreement. In essence, Petitioners argue that a forum selection clause in the context of prospective litigation is entitled to less scrutiny than a forum selection clause in a release agreement. That argument fails. In fact, in the context of an international agreement, less scrutiny would apply in those instances where a party has sustained a specific injury in a specific geographic location; where a party has had the opportunity to negotiate a release, a party should be free to decide what an appropriate forum would be for any disputes that arise out of the settlement agreement. In spite of Petitioners' attempt to argue to the contrary, agreements which call for litigation in a specific location for disputes arising out of injuries only anticipated in the future should be entitled to a higher standard. Nevertheless, this Court has already articulated the correct standard, that being, forum selection clauses are presumptively valid, but may be overcome by a clear showing that the provision is unreasonable under the circumstances. The Circuit Court applied that test here; therefore, its decision should not be disturbed.

F. The Settlement Was Adequate Under the Circumstances (Addressing pp. 11-12 of the Petition).

Petitioners seek to divert this Court's attention from the forum selection clause to again attack the settlement agreement itself. Petitioners argue that the Court of Appeals ignored evidence that the seaman's settlement was grossly inadequate. That argument fails for at least three (3) reasons. First, Mr. Augustin Panta was not a seaman. Second, Petitioners presented no evidence that the settlement agreement was inadequate. Third, by Peruvian standards, the settlement was reasonable since the family received approximately one year's salary.

Petitioners argue that Afram has a heavy burden to enforce a seaman's release. Although a true statement of the law, it does not apply in this case because Mr. Augustin Panta was not a seaman. Rather, the record is clear that he was a Peruvian security guard on board the SS TAMPA BAY while the vessel was in Peruvian waters.[26]

In an effort to attack the settlement agreement as a whole, Petitioners argue that the amount of the settlement was inadequate;

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26. *Afram*, 145 F.3d at 300.

however, Petitioners failed to present any evidence regarding what a fair settlement would be. Rather, as the Court of Appeals noted, Afram settled the dispute with the Petitioners for approximately one year's salary under Peruvian standards.[27]

II.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO NEED FOR GUIDANCE FROM THIS COURT SINCE THE RULE REGARDING ENFORCEMENT OF FORUM SELECTION CLAUSES IS CLEAR.

(Addressing Point II, pp. 12-19).

A. Petitioners Attempt to Create a False Conflict

(Addressing pp. 12-19 of the Petition).

In an effort to persuade this Court to grant their Petition, Petitioners attempt to create a false conflict among the Circuits regarding how the lower courts determine when the enforcement of a forum selection clause violates public policy. Petitioners start with the basic proposition that under *M/S BREMEN* a forum selection clause is not enforceable if it contravenes a strong public policy of the forum in which the suit is brought. Petitioners then take a giant leap and apply domestic diversity cases subject to 28 U.S.C. § 1404(a),[28] which governs transfer of venue. That argument fails because those cases specifically hold that § 1404(a) takes precedence over a domestic forum selection clause in a domestic contract.[29] Since the same concerns are not present in the context of international agreements, the cases cited are simply inapposite.

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27. *Afram*, 145 F.3d at 301.

28. Section 1404, entitled "Change of Venue", provides in pertinent part that:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

29. *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988) (holding that § 1404(a) controls a party's request to give effect to the parties' contractual choice of venue and transfer of a case).

B. The *Quarrington* Decision Is an Outdated Statement of the Law (Addressing pp. 13-15 of the Petition).

Petitioners attempt to create a conflict based on a 1939 decision from the Second Circuit, *The Quarrington Court*.[30] Petitioners argue that the Limitation of Liability Act's requirement of concursus[31] precludes the enforcement of a forum selection clause. This argument likewise fails for at least three (3) reasons.

First, *Quarrington* was decided in an era that disfavored forum selection clauses because they were thought to oust a court's jurisdiction. However, this Court's decision in *M/S BREMEN* rejected the "ouster of jurisdiction" theory and articulated a policy underlying the presumptive validity of forum selection and choice-of-law provisions because the United States courts cannot "insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[32]

Second, even in an era of judicial paternalism, the Court of Appeals for the Second Circuit noted that

> [a]n owner may defend an independent suit brought against him before a limitation proceeding is begun, or may compromise a claim under like circumstances, and still require all claimants to establish their rights in the limitation proceeding.[33]

Even if the *Quarrington* case still constituted a viable pronouncement of the law, which it does not, Afram was settling the Petitioners' claim at approximately the same time that it was instituting the Limitation of Liability proceeding.[34]

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30. 102 F.2d 916 (2d Cir.), *cert. denied*, 307 U.S. 645 (1939).

31. Within the Limitation of Liability context where there are multiple claimants, vessel owners may request that all of the claimants assert their demands in one lawsuit against the limitation fund. This is known as "concursus". *See* 3 BENEDICT ON ADMIRALTY § 52 (1997).

32. *M/S BREMEN*, 407 U.S. at 9, 92 S. Ct. at 1912-13, 32 L. Ed. 2d at 520.

33. *The Quarrington Court*, 102 F.2d at 919.

34. In any event, the *Quarrington* decision predates the analysis currently used by the various courts regarding the presumptive validity of forum selection (Cont'd)

Third, Petitioners argue that concursus overrides any other concerns and cite two cases from this Court regarding the public policy behind concursus, *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*[35] and *Maryland Casualty Co. v. Cushing*.[36] These two cases simply note that one purpose of the Limitation of Liability Act is to foster American shipping, while another purpose is to assist in the equitable resolution of claims. The Court of Appeals in the present case acknowledged the competing policy concerns, and opted in favor of enforcing the forum selection clause in light of this Court's more recent decisions.[37]

C. There Is No Conflict Between the Fifth And Tenth Circuits (Addressing p. 15 of the Petition).

Petitioners, no doubt through an incorrect reading of *Jones v. Weibrecht*,[38] claim that the Tenth Circuit "refused to enforce a forum selection clause that called for litigation in state court over claims subject to the Miller Act."[39] That reading is simply flawed.

In *Jones*, the contracts at issue involved agreements pertaining to the sale by Jones to Weibrecht of the stock of Culspar, Inc., followed by the alleged default by Weibrecht and his partner on the promissory note executed as part of the transaction.[40] The relevant agreements

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(Cont'd)

and choice-of-law provisions. *Vimar Seguros y Reaserguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 538, 115 S. Ct. 2322, 2329, 132 L. Ed. 2d 462, 474 (1995); *Shute*, 499 U.S. at 595, 111 S. Ct. at 1528, 113 L. Ed. 2d at 633; *M/S BREMEN*, 407 U.S. at 15, 92 S. Ct. at 1916, 32 L. Ed. 2d at 523.

35. 273 U.S. 207, 47 S. Ct. 357, 71 L.Ed. 612 (1927) (bond issue in the Limitation of Liability context).

36. 347 U.S. 409, 74 S. Ct. 608, 98 L.Ed. 806 (1953) (split court regarding conflicts between Louisiana statutes and federal statutory law).

37. *Afram*, 145 F.3d at 302-3.

38. 901 F.2d 17 (10th Cir. 1990).

39. Petition at p. 15.

40. 901 F.2d at 18.

contained identical forum selection clauses designating a New York state court in Essex County as the exclusive venue for any action between the parties.[41] Asserting diversity jurisdiction, Jones filed a lawsuit in a federal district court seeking recision of the two (2) agreements. The district court dismissed the action and concluded that "the agreements' forum selection clauses, which designated the state court in Essex county as the exclusive venue for litigation, were enforceable."[42]

The Tenth Circuit, affirming the district court, used the analysis in *M/S BREMEN* noting that Jones could not make the required showing to obstruct the enforcement of the forum selection clauses in the contracts.[43]

In conclusion, there was no variance from the analysis used in the case currently before the Court.

III.

THE PETITION SHOULD BE DENIED BECAUSE THE DOCTRINE OF JUDICIAL ESTOPPEL DOES NOT APPLY IN THE PRESENT CASE; THEREFORE, THIS COURT NEED NOT CONSIDER THE FORMULATION OF A UNIFORM RULE TO DETERMINE WHEN A PARTY MAY RAISE THE ARGUMENT.

(Addressing Point III, pp. 19-21).

Petitioners argue that this Court should grant the Petition in order to formulate a uniform rule for the application of judicial estoppel. However, there is no real conflict among the Circuits, and this is not an issue of national jurisprudential importance.

Judicial estoppel, a creature of equity, is a well recognized doctrine applied to protect the integrity of the judicial system by preventing a party from contradicting in a second lawsuit its sworn statement in previous litigation.[44] The doctrine is simply inapplicable in this case

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41. 901 F.2d at 18.

42. 901 F.2d at 18.

43. 901 F.2d at 19.

44. *See, e.g., Grant v. Lone Star Co.*, 21 F.3d 649, 651 n. 2 (5th Cir. 1994); *United States v. C.I.T. Constr. Inc. of Texas*, 944 F.2d 253, 258 (5th Cir. 1991).

because Afram did not contradict any sworn statement made in prior litigation.[45]

IV.

THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS ADDRESSED ALL OF THE ISSUES PROPERLY BEFORE IT.

(Addressing Point IV, pp. 21- 25).

A. Petitioners Have Failed to Raise a Valid Point of Review as This Is Not an Error Correcting Court

(Addressing pp. 21-25 of the Petition).

Although Petitioners ignore the fact that this Court is not an error correcting court, as are the intermediate courts of appeal, they nevertheless argue that reversible error was committed by the Court of Appeals because it failed to address all of the issues on appeal. A brief review of the Court of Appeals' opinion and the issues preserved for appeal reveals that Petitioners' argument lacks foundation.

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45. In its opinion, the Court of Appeals noted:

> The Pantas (Petitioners) argue that when it (Afram) filed its Limitation Act complaint, Afram misrepresented to the district court that there were no other "legal proceedings" underway. The Pantas contend that the subsequent settlement was a "legal proceeding" and that it was in violation of the representation in the complaint.
>
> Assuming *arguendo* that the Pantas are correct that the subsequent settlement is a "legal proceeding," they still have failed to make an additional showing needed to obtain judicial estoppel: They have not demonstrated the court's acceptance and reliance on Afram's misrepresentation. "[W]e find no evidence in the record that demonstrates [the court's] acceptance of the position taken [by Afram in its complaint]." (Citation omitted).

Afram, 145 F.3d at 304.

B. The Lower Court Properly Disposed of the Judicial Estoppel Argument
(Addressing pp. 22-24 of the Petition).

Despite Petitioners' assertions to the contrary, the Court of Appeals considered their judicial estoppel argument. In fact, the Court of Appeals took great pains to defer to Petitioners by making certain assumptions. Even with such broad deference, the Court of Appeals correctly held that the doctrine was of no avail to Petitioners.

Petitioners argue that the Court of Appeals "manufactured" a completely different argument regarding judicial estoppel because they argued that Afram could not, after accepting the benefits of the Limitation of Liability Act, take a position inconsistent with the legislation. That argument, however, fails as well because participation in a limitation of liability proceeding does not act as a waiver of a forum selection provision.[46]

C. Unilateral Mistake Was Considered by the Court of Appeals
(Addressing p. 24 of the Petition).

Petitioners argue that the Court of Appeals did not consider their argument on unilateral mistake. However, the opinion noted that Petitioners' claim of mistake failed because they did not offer any evidence that the forum selection clause, rather than the entire settlement agreement, was the result of some contract-excusing mistake.[47]

D. The Economic Duress Argument Went to the Settlement Agreement as a Whole, and Not to the Forum Selection Clause
(Addressing pp. 24-25 of the Petition).

The economic duress argument was directed at setting aside the settlement agreement, and not to invalidate the forum selection provision.[48] Furthermore, as indicated by the district court's order dated

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46. *M/S BREMEN*, 407 U.S. at 17, 92 S. Ct. at 1917, 32 L. Ed. 2d at 526.

47. *Afram*, 145 F.3d at 302 n.4.

48. *Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622; *Haynsworth*, 121 F.3d at 963; *MIRA M/V*, 111 F.3d at 33.

June 26, 1997, it did not consider any party's position concerning the validity of the settlement agreement since there was no evidence of any fraud or overreaching in placing the forum selection provision in the agreement. Since all of these arguments were directed to the merits of Petitioners' rights to set aside the settlement agreement and pursue a cause of action for damages as a result of the injury and death of Augustin Panta, these arguments could not form the basis for invalidating the forum selection provision; and both the district court and the Court of Appeals properly dismissed the litigation to allow the Peruvian courts to decide the dispute regarding the validity of the settlement agreement.

CONCLUSION

Therefore, in light of the above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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